(3)

NO. 91-1576

Supreme Court, U.S.
FILED
MAY 7 1992
OFFICE OF THE CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1991

LESTER LEVENE, SR. and SHIRLEY LEVENE
and
AMERICAN CASUALTY INSURANCE COMPANY
Petitioners

versus

PINTAIL ENTERPRISES, INC., LLOYDS OF LONDON, and SCOTTSDALE INSURANCE COMPANY
Respondents

FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF PETITIONERS, LESTER LEVENE, SR., SHIRLEY LEVENE, AND AMERICAN CASUALTY INSURANCE COMPANY

JOHN E. McELLIGOTT, JR.
Post Office Drawer 2908
Lafayette, Louisiana 70502
(318) 237-1660
Attorney for Lester Levene, Sr.
and Shirley Levene, Plaintiffs - Petitioners

JAMES C. LOPEZ
Post Office Drawer 1299
Opelousas, Louisiana 70571
(318) 948-8201
Attorney for American Casualty
Insurance Company, Intervenor - Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

TABLE OF CONTENTS

PAGE

Table of Contents i

Table of Cases and Authorities ii

Reply to Respondent's Argument 1

Certificate of Service 5

TABLE OF CASES AND AUTHORITIES

CASES **Pages**

Gonzalez v. Southern Pacific Transp. Co., 773 F.2d 637, 639 (5th Cir. 1985) 1

STATUTE

28 U.S.C. § 1254 3

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents have alleged in their opposition brief that this Honorable Court has no jurisdiction over this matter because the Petition for Writ of Certiorari was not timely filed. It is the position of Respondents that a Suggestion for Rehearing pursuant to Rule 35(b) is not considered a petition for rehearing for purposes of Supreme Court Rule 13.4, and, therefore, the time for filing the Petition for Writ of Certiorari ran from the date of the appellate decision, September 19, 1991, and not from the denial of the Suggestion for Rehearing en banc on October 25, 1991.

Respondents, in a footnote on page 6 of their opposition brief, acknowledge that the Fifth Circuit's minute entry of October 25, 1991, does treat the Suggestion for Rehearing en banc as a Petition for Rehearing. Petitioners attached the U. S. Fifth Circuit's minute entry of October 25, 1991, to their Petition for Writ of Certiorari. It is very clear that the Fifth Circuit treated the Suggestion for Rehearing en banc filed by petitioners as a Petition for Rehearing.

Respondents conveniently omit the *published* Internal Operating Procedures of the U. S. Fifth Circuit accompanying Local Rule 35 from their opposition brief. The Fifth Circuit has a published practice of treating all suggestions for rehearing en banc, no matter how styled, as containing both petitions for panel rehearing and suggestions for rehearing en banc. See *Gonzalez v. Southern Pacific Transp. Co.*, 773 F.2d 637, 639 (5th Cir. 1985).

In *Gonzalez*, the U.S. Fifth Circuit made the following pronouncement:

"II.

[2] Southern Pacific has sought rehearing en banc, not by the panel. Nevertheless, a suggestion for rehearing en banc remains within the plenary control of the panel deciding the case unless voted en banc by a majority of active circuit judges. As the Internal Operating Procedures of the Fifth Circuit provide, '[a] *suggestion for rehearing en banc will be treated as a petition for rehearing by the panel if no petition is filed.* The panel may grant rehearing without action by the full Court.'

Our Internal Operating Procedures demarcate the circumstances appropriate for rehearing en banc and for panel rehearing. En banc consideration is 'an extraordinary procedure which is intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court [or] Fifth Circuit precedent. Alleged errors...in the facts of the case...or error asserted in the misapplication of correct precedent to the facts of the case, are matters for panel rehearing but not for rehearing en banc.' " Id. at 641. (Emphasis added)

The Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit accompanying Local Rule 35 provide in part:

"Handling of Petition by the Judges

Panel Has Control - Although a copy of the suggestion for rehearing en banc is distributed to each panel judge and every active judge of the Court, the filing of a suggestion for rehearing en banc does not take the case out of the plenary con-

trol of the panel deciding the case. *A suggestion for rehearing en banc will be treated as a petition for rehearing by the panel if no petition is filed.* The panel may grant rehearing without action by the full Court." (Emphasis added).

As clearly described in the above *published* Internal Operating Procedures of the Fifth Circuit, the Fifth Circuit has a routine and standard practice of treating all suggestions for rehearing en banc as a petition for rehearing by the panel if no petition is filed. This is the exact procedure that the Fifth Circuit followed in this case as is reflected in the minute entry dated October 25, 1991. Petitioners relied on these published local rules and Internal Operating Procedures in calculating the time when the Petition for Writ of Certiorari had to be filed. The Petition for Writ of Certiorari was timely filed as it was filed within ninety (90) days from the October 25, 1991, minute entry by the U. S. Fifth Circuit denying the request for rehearing.

Respondents next contend that Petitioners failed to identify any jurisdictional basis for this Court. However, in Petitioners' brief under *Statement of Jurisdiction,* Petitioners specifically stated that this case is an appeal from the United States Fifth Circuit Court of Appeals. Petitioners further stated that the judgment sought to be reviewed was rendered on September 19, 1991, by the U. S. Fifth Circuit. Petitioners also stated that the Petition for Rehearing and Suggestion for Rehearing en banc filed by Petitioners was denied by the U. S. Fifth Circuit on October 25, 1991.

Petitioners clearly specified that jurisdiction was based on an appeal from a decision by the U. S. Fifth Circuit. 28 U.S.C. Section 1254 allows anyone to file a Petition for Writ of Certiorari with the United States Supreme

Court to review a case in the courts of appeals.

Although admittedly Petitioners cited the incorrect statute as a basis for jurisdiction, Petitioners specifically stated under *Statement of Jurisdiction* that this case was an appeal from the U. S. Fifth Circuit. Jurisdiction of this Honorable Court was succinctly stated by Petitioners in their brief. Respondents are attempting to divert the attention of the highest Court in the land away from the merits of this case by raising groundless jurisdictional objections.

Respectfully submitted,

DAVIDSON, MEAUX, SONNIER,
McELLIGOTT & SWIFT

By:/s/ John E. McElligott, Jr.

JOHN E. McELLIGOTT, JR.
Post Office Drawer 2908
Lafayette, LA 70502
(318) 237-1660
Attorney for Lester Levene, Sr.
and Shirley Levene
Plaintiffs-Petitioners

GUGLIELMO, LOPEZ, TUTTLE
& WALKER

By:/s/ James C. Lopez

JAMES C. LOPEZ
Post Office Drawer 1299
Opelousas, LA 70571
(318) 948-8201
Attorney for American Casualty
Insurance Company
Intervenor-Petitoner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Reply to Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been forwarded to all counsel of record by placing same in the United States Mail, postage prepaid and properly addressed.

Lafayette, Louisiana, this ____ day of May, 1992.

/s/ J. McElligott, Jr.
JOHN E. McELLIGOTT, JR.